1966

Utah Cooperative Association, A Utah Corporation v. Wilburn Dale Helm and Mariel. Helm, His Wife : Appellant's Brief

In the

Supreme Court of the State of Utah

UTAH COOPERATIVE ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,

—vs.—

WILBURN DALE HELM and MARIE L. HELM, his wife,
Defendants and Respondents.

No. 10[illegible]

APPELLANT'S BRIEF

Appeal from Summary Judgment and [illegible] Denying: Plaintiff's Motion to Set Aside [illegible] Judgment, Plaintiff's Motion for Permission [illegible] an Amended Complaint, and Plaintiff's Motion [illegible] an Order Requiring Plaintiff to Make Deposit [illegible] in Court Pendente Lite, Which Summary Judgment and Order Were Entered by the Fourth District Court for Utah County

Hon. Joseph E. Nelson Judge
Hon. R. L. Tuckett, Judge

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In the
Supreme Court of the State of Utah

UTAH COOPERATIVE ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,

—vs.—

WILBURN DALE HELM and MARIE L. HELM, his wife,
Defendants and Respondents.

No. 10509

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for a Declaratory Judgment declaring and determining the meaning of a lease between the plaintiff as lessee and the defendants as lessors, or in the alternative, a reformation of said lease.

DISPOSITION IN LOWER COURT

Summary Judgment was granted in favor of the defendants, and the plaintiff's Motions to set aside the Summary Judgment, for permission to file an Amended Complaint, and for an Order requiring the plaintiff to make deposits in court pendente lite were denied. From the Summary Judgment and denial of the plaintiff's Motions, the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a setting aside of the Summary Judgment, an Order granting plaintiff permission to file its Amended Complaint and an Order requiring the plaintiff to make deposits in court pendente lite.

STATEMENT OF FACTS

On May 5, 1961, the defendants Wilburn Dale Helm and Marie L. Helm, his wife, as lessors, entered into a written lease agreement with the plaintiff, Utah Cooperative Association. (R. 7). The leased property consisted of a service station located on the old State highway just north of Orem, Utah, and the plaintiff undertook to operate the service station pursuant to the lease agreement. (R. 3, 7, 4)

At the time of entering into the lease the plaintiff and the defendants were aware that the leased premises would be used by the plaintiff as a service station and that the new freeway now completed between Lehi and Provo was then being planned. (R. 3, 4, 16, 26)

Paragraph 7 of the lease between the parties was written to provide as follows:

> Lessor shall keep in force at their expense sufficient fire and comprehensive insurance on the building to pay for the repair or construction of said building if it is damaged or destroyed by fire or other casualty, which policy shall contain a loss payable clause in favor of lessee as its interest may appear. If the premises are rendered wholly or partially unfit for occupancy by any

> such damage or destruction, or if, for any reason, the possession or beneficial use of the premises is interfered with, the rent hereunder shall abate until the premises are fully restored to fitness for occupancy or such interference has ceased. It is understood and agreed that if by reason of any law, ordinance or regulation of properly constituted authority, or by injunction, lessee is prevented from using all or any substantial or material part of the property herein leased as a service station for the sale and storage of gasoline and petroleum products, or if the use of the premises as a service station shall be in any substantial or material manner restricted, or should any governmental authority refuse at any time during the term or extension of this lease to grant such permits as may be necessary for the installation of reasonable equipment and operation of said premises as a service station, then the lessee may, at its option, surrender and cancel this lease, remove its improvements and equipment from said property and be relieved from the payment of rent or any other obligation as of the date of such surrender.

Upon completion of the contemplated freeway, due to the alteration of the flow of traffic away from the leased premises, the plaintiff sought to exercise the option to surrender and cancel the lease and be relieved from the payment of rent or any other obligation pursuant to the terms of paragraph 7 set forth above. (R. 5, 16, 53) However, the defendants contended that the plaintiff had no right to exercise the option and demanded that the plaintiff continue to pay to the defendants the rental payments reserved by the lease. (R. 5, 16, 18, 53) Subsequently, the plaintiff's original complaint was filed on

July 1, 1965, (R. 15, 52) whereby the plaintiff sought a declaratory judgment allowing the plaintiff to exercise the option described. Thereafter the defendants answered the complaint, denying that the plaintiff was entitled to the relief prayed for. (R. 16) The defendants then moved for summary judgment based upon the complaint and the answer thereto and the affidavit of Wilburn Dale Helm, one of the defendants, which affidavit was filed along with the motion for summary judgment. (R. 17, 18) Mr. Helm's affidavit stated that paragraph 7 of the lease between the parties "was intended to cover situations in which the lessee was prevented from using the station by reason of an act of law, ordinance or regulation. That it did not encompass circumstances such as that complained of in the plaintiff's complaint." The plaintiff then filed the counter-affidavit of Mr. Erval Hansen who affirmed that he had negotiated the lease with the defendant Wilburn Dale Helm on behalf of the plaintiff and that the terms of paragraph 7 pleaded in the plaintiff's original complaint were intended by the parties to provide the plaintiff with the right to terminate the lease in the event the contemplated freeway substantially impaired the profitable operation of a service station on the leased premises. (R. 20) In addition, a second counter-affidavit was filed by the plaintiff, wherein Mr. W. B. Robins, the Executive General Manager of the plaintiff, affirmed that the "subject matter of said lease, the situation of the parties, the purposes of the parties had in mind at the time the lease was made and other surrounding circumstances showed that it was the intent of the parties to provide" the plaintiff with the right to termi-

nate the lease in the event the completion of the contemplated freeway substantially impaired the use of the leased premises as a service station. (R. 22)

At the hearing on the defendants' motion for summary judgment, the defendants introduced in evidence a letter (R. 26) from Henry C. Helland, State Director of Highways, to defendants' counsel, wherein Mr. Helland stated:

> A public hearing for the proposed interstate highway from Provo to Lehi was held in Provo on February 24, 1958. The route as presented at the hearing with minor modifications was officially adopted by the Road Commission on March 17, 1958.
>
> It was stated at the hearing that hopefully the construction would start in late 1958 and be completed about three years after starting. Bids on the first construction in the area were opened on February 17, 1959 and the total route dedicated and officially opened to traffic on August 28, 1964.

The facts stated by Mr. Helland are not in dispute.

The hearing on defendants' motion for summary judgment was held before the Honorable J. L. Tuckett, who took the matter under advisement. Thereafter, a minute entry (R. 25) was filed indicating that the defendants' motion had been granted and a summary judgment was filed dismissing the plaintiff's action with prejudice. (R. 47) It is interesting to note that the Honorable Joseph E. Nelson signed the summary judgment, although the hearing had been held before the Honorable J. L. Tuckett. (R. 25, 47)

After being notified of the summary judgment against it, the plaintiff filed a motion to set aside the summary judgment, (R. 55) togeether with motions for permission to file an amended complaint, (R. 51) and for an order requiring the plaintiff to make deposits in court pendente lite. (R. 50) In Count I of its proposed amended complaint, (R. 27), the plaintiff sought declaratory relief based upon that portion of paragraph 7 of the lease pleaded in its original complaint. (R. 28) In Count II of its proposed amended complaint the plaintiff sought declaratory relief based upon that portion of paragraph 7 which reads as follows:

> . . . [i]f for any reason the possesion or beneficial use of the premises is interfered with, the rent hereunder shall abate until the premises are fully restored to fitness for occupancy or such interference has ceased. (R. 30)

In addition, in Count III the plaintiff's proposed amended complaint alleged an alternative cause of action for reformation of the lease to make it conform to the actual agreement of the parties. (R. 31)

By its motion requiring it to make deposits in court pendente lite, the plaintiff sought the court's permission to pay into court the $275.00 per month reserved as rental payments under the terms of the lease. (R. 50)

The plaintiff has not used the leased premises for any purpose whatsoever since January 1, 1965, and since that date the premises have been vacant and have produced no income to the plaintiff, (R. 53) and although the plaintiff used its best efforts to sublet or otherwise economically use the property, it has been unable to do so since January 1, 1965. (R. 53)

Between January 1, 1965, and the time the plaintiff filed its motion for an order requiring deposits to be made into court pendente lite the plaintiff paid to the defendants the monthly rental of $275.00 per month or a total of $2,750.00, during which time the plaintiff received no income from the property. (R. 53). The amount of $1,100.00 of the $2,750.00 paid as aforesaid was paid between the time this action was filed on July 1, 1965, and the filing of plaintiff's motion for the requested order. (R. 53, 54)

After a hearing on the plaintiff's motions, the court refused to set aside the summary judgment and denied the plaintiff's motion for permission to file its proposed amended complaint and also denied the plaintiff's motion for an order requiring the plaintiff to make deposits of the monthly rental in court pending the termination of the litigation. (R. 86)

ARGUMENT

POINT NO. 1

THE COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REFUSING TO SET ASIDE SAID SUMMARY JUDGMENT FOR THE REASON THAT PARAGRAPH 7 OF THE LEASE CLEARLY ENTITLES PLAINTIFF TO THE RELIEF SOUGHT.

The lease executed by all parties to this action provides in pertinent part as follows:

> 7. Lessor shall keep in force at their expense, sufficient fire and comprehensive insurance on the

> building to pay for the repair or construction of said building if it is damaged or destroyed by fire or other casualty, which policy shall contain a loss payable clause in favor of lessee as its interest may appear. If the premises are rendered wholly or partially unfit for occupancy by any such damage or destruction, or if, for any reason, the possession or beneficial use of the premises is interfered with, the rent hereunder shall abate until the premises are fully restored to fitness for occupancy or such interference has ceased. It is understood and agreed that if by reason of any law, ordinance or regulation of properly constituted authority, or by injunction, Lessee is prevented from using all or any substantial or material part of the property herein leased as a service station for the sale and storage of gasoline and petroleum products, *or if the use of the premises as a service station shall be in any substantial or material manner restricted,* or should any governmental authority refuse at any time during the term or extension of this lease to grant such permits as may be necessary for the installation of reasonable equipment and operation of said premises as a service station, *then the Lessee may, at its option, surrender and cancel this lease, remove its improvements and equipment from said property and be relieved from the payment of rent or any other obligation as of the date of such surrender.* (Emphasis added.)

The portions of paragraph 7 emphasized above, by use of the phrase "shall be in *any* substantial or material manner restricted" leave no doubt that the construction of a new highway resulting in a great alteration of the flow of traffic away from the leased premises, as alleged in plaintiff's original complaint and in Count I of the proposed amended complaint, is a ground for termination of

the lease. The generic, all inclusive term "any", like the other terms used, is to be taken and understood in its "ordinary and popular sense." (See 2 *Jones on Evidence,* 491, p. 950 (5th Ed., 1958).) Certainly, the alleged construction of the new highway and resulting great alteration of the flow of traffic constitutes a "manner" by which the use of the premises as a service station were substantially and materially restricted.

With regard to the present case, the conclusion as to what the phrase means can be no different if the entire sentence, of which the phrase forms a part, is considered as a whole. The parenthetical phrases on either side speak of governmental manners and means of restricting the use of the premises as a service station. If the phrase "in any substantial or material manner" is likewise understood to include only restrictions from acts of government, then the recent construction of a new highway in the area of the leased premises, as alleged in plaintiff's original and proposed amended complaint, would enable the plaintiff to terminate the lease as a result of the governmental act of constructing the highway.

In addition, the plaintiff's contention that the subject provision is plain and unambiguous on its face, is substantiated by a consideration of paragraph 7 as a whole. It becomes obvious to the reader that paragraph 7 gives to the Lessee the option to abate the rent due and continue the lease, or terminate the lease and be relieved of any further obligation thereunder, if the use of the premises as a service station is interfered with or restricted for any reason or by any means.

It is respectfully submitted that the language of paragraph 7 of the lease between the parties clearly entitles the plaintiff to the relief prayed for in its original and proposed amended complaints. The trial court's summary judgment in favor of the defendant, and dismissal of plaintiff's original complaint with prejudice is erroneous as a matter of law.

POINT NO. 2

ASSUMING THE PLAINTIFF IS NOT SUSTAINED IN ITS CONTENTION SET FORTH IN POINT 1 HEREIN, THE COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REFUSING TO SET ASIDE SAID SUMMARY JUDGMENT FOR THE REASON THAT THE OPPOSING AFFIDAVITS FILED BY THE PARTIES RAISED A GENUINE ISSUE AS TO MATERIAL FACTS.

Inasmuch as the defendants filed with their Motion for Summary Judgment an affidavit wherein the defendant, Wilburn Dale Helm, stated that paragraph 7 of the lease was not intended to permit plaintiff to terminate the lease for the reasons alleged in plaintiff's original complaint, and and the plaintiffs filed counter affidavits sworn to by plaintiff's agents stating just the opposite, unquestionably issues of fact were created. Therefore, the only real question for consideration here is whether the contested facts are material, which materiality turns upon the application of the parol evidence rule.

The law as to the propriety of granting a summary

judgment, where application of the parol evidence rule is involved, was impressively stated in *Kidman v. White*, 14 Ut. 2d 142, 378 P.2d 898 (1963). When remanding for trial, following summary judgment granted by the trial court, this court stated as follows:

> In confronting the problem presented on this appeal, we have been advised to remain aware that a summary judgment, which turns a party out of court without an opportunity to present his evidence, is a harsh measure that should be granted only when, taking the view most favorable to a party's claims and any proof that might be proper, that might properly be adduced thereunder, he could in no sense prevail. That both parties hereto make plausible arguments that the contract in question is so manifestly in their favor that reasonable minds could not see it the other way is a pointed commentary of the ability of the human mind to rationalize in its own interests. It is equally so upon the desirability and the propriety of resolving any doubts in favor of permitting courts and juries to settle such disputes rather than ruling upon them summarily as was done here.

To the same effect see *Tanner v. Utah Poultry and Farmeres Cooperative*, 11 Ut. 2d 353, 359 P. 2d 18 (1951).

From the foregoing it is apparent that a summary judgment where the question of parol evidence is before the court, should not be hastily indulged. With regard to the present case, if parol or other extraneous evidence is admissible to ascertain the intention of the parties to the lease, then the summary judgment was erroneously granted. Fundamentally, in Utah as elsewhere, the admissability of parol or other extraneous evidence

turns on whether the writing under consideration is uncertain or ambiguous. It is the plaintiff's position, as discussed in Point 1 herein, that paragraph 7 of the lease in question is so clear and unambiguous as to entitle the plaintiff to terminate the lease with impunity, without resorting to extraneous or parol evidence. However, should the court conclude that the language in question does not clearly support the plaintiff's contention, then, at the very least, it must be said that the language is uncertain or ambiguous, thereby making extraneous or parol evidence admissible for the purpose of explaining what was meant by what was written in paragraph 7.

In *Radley v. Smith,* 8 Utah 2d 1, 313 P.2d 465 (1957), this court held:

> Whenever uncertainty or ambiguity exist with respect [to a writing] it is proper for the court to consider all of the facts and circumstances, including the words and actions of the parties forming the background of the transaction.

The same rule was adopted, couched in different terms, in *Continental Bank & Trust Company vs. Stewart,* 4 Ut. 2d 228, 291 P.2d 890 (1955), wherein it was held:

> In view of the lack of definiteness in the terms of the contract it is proper for the court to receive extraneous evidence as to its meaning. It is true that the expressed terms and agreement may not be abrogated, nullified or modified by parol testimony; but where because of vagueness or uncertainty in the languge used, the intent of the parties is in question, the court may consider the situation of the parties, the facts and circumstances surrounding the making of the contract,

> the purpose of its execution, and the respective claims thereunder, to ascertain what the parties intended.

In the *Radley* and *Continental Bank* cases, note the use of the terms "uncertainty" and "lack of definiteness" and "vagueness," which conditions, like an "ambiguity" authorize the admission of parol evidence. The notation is meaningful, for if the language of the lease in paragraph 7, relied on in plaintiff's original complaint and in Count I of plaintiff's proposed amended complaint, does not clearly and unnequivocably entitle the plaintiff to a favorable judgment, or if the court does not deem the language ambiguous, then, within the context of this case, the language used certainly smacks of "uncertainty," "lack of definiteness" or "vagueness." This must be so, for paragraph 7 obviously does not say "'the service station lease may *not be terminated* if the highway construction greatly alters the flow of traffic away from the leased premises." In this connection, the holding in *Bamberger Company v. Certified Productions, Inc.*, 88 Ut. 194, 48 P. 2d 489 (1935) is pertinent. Therein, faced with the construction of a lease, the court held the lease ambiguous and concluded that the allegations in the defendants' answer had been improperly stricken by the trial court, then wrote as follows at 48 P.2d 294:

> As stated before, we must give the defendant the benefit of every implication or inference which may arise out of the language of the parts stricken. Certainly, if the contract itself states definitely, so that there is no latent or patent ambgiuity as to what alterations are required, then there would be no room for any evidence as to what the parties contemplated as comprising the necessary altera-

> tions. *If, on the other hand, the contract, while on its face appearing to be certain, would open up an ambiguity when attempts were made to apply it to the subject matter, then such ambiguity could be resolved by evidence of what meaning the parties themselves intended to invest such terms.* (Emphasis added.)

In so stating, the court relied upon *Kalueder vs. Joseph Schlitz Brewing Company,* 143 Wis. 347, 128 N.W. 43, wherein it was written:

> Ambiguity in a written contract calling for construction may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense.

So also it may be possible for this court to conclude that the words "if the use of the premises as a service station shall be in any substantial or material manner restricted," as used in paragraph 7, are plain and certain, as has been previously contended by the plaintiff, but uncertain when applied to the subject matter of the lease. In either event, it was error for the trial court to grant the defendants' motion for summary judgment.

Upon application of the language of paragraph 7 to the subject matter of this lawsuit, it is difficult to comprehend how anyone could conclude that paragraph 7 of the lease was intended to mean anything other than that the plaintiff could elect to terminate the lease as alleged in plaintiff's original complaint and in Count I of the plaintiff's proposed amended complaint. In this regard, the present case is similar to *Brimwood Homes, Inc. v.*

Knudsen Builders Supply Company, 14 Ut. 2d 419, 385 P.2d 982 (1963), wherein this court had before it for consideration the following language used in a receipt and lien release which had been executed by the defendant, Knudsen Builders Supply Company:

> This receipt is executed and delivered by the undersigned to the association to induce it to make payment to the undersigned of the above stated sum from the funds held by it for the owner of the above described real property and in consideration thereof the undersigned hereby waives, releases and discharges any lien or right to lien the undersigned has or may hereafter acquire against said real property.

Knudsen Builders Supply contended that it was the intention of the parties in drafting the release as set forth above, that said defendant would release its right to a lien only as to the amount set forth in the authorization and, further, that there was no consideration to support the promise to release any right to a lien that it might thereafter acquire. On the other hand, the plaintiff contended that the release was a three-party agreement whereby the plaintiff offered to pay the defendant, through its agent, the association, upon the condition that the defendant release its lien rights, both present and future. In spite of the language of the release, which on its face simply does not contain the qualification claimed by the defendant, the court had the following to say:

> *Under the circumstances of this case,* we do not believe that the defendant, nor the plaintiff, intended that the release and waiver agreement would relate to any future lien rights which defendant might acquire. The executed documents

> designated as a 'release and waiver' related only to the particular debt paid and receipted for in the particular transaction encompassed by that particular instrument. This included any lien the defendant 'has or may hereafter acquire against the said property' in regard only to that particular debt. (Emphasis added.)

In the present case, it could also be said that "under the circumstances of this case" the parties never intended that the plaintiff would be unconditionally bound by a ten-year lease while knowing that the profitable use of the leased property as a service station was in jeopardy by the intended freeway construction in Utah County. No one can be so naive as to think that this particular circumstance was not a very important consideration in May of 1961 when the lease was executed. The point made here also finds support in the Utah case of *Pen Star Mining Company v. Lyman,* 64 Ut. 343, 231 P. 107 (1924) wherein it was said:

> There is still another principal, which is also well established, that, in case the meaning of the language is doubtful, one party to the contract will be held to that sense in whch he knew or understood the other party understood the doubtful word or language.

Regardless of what the defendants now say was intended by the language used in paragraph 7 of the lease, it cannot be seriously disputed that the defendants knew that plaintiff was relying on the language of paragraph 7 to provide a protective option allowing the plaintiff to terminate the lease in the event the highway construction substantially impaired the profitable use of the leased premises as a service station.

The rule in *Cain v. Hagenbarth,* 37 Ut. 69, 106 P. 945 (1910) is also pertinent. The rule is as follows:

> When the exact meaning of a written contract is in doubt, as where the language used is contradictory and obscure, and there are two interpretations possible, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former should prevail.

At the time the lease was executed the business risks occasioned by the intended highway construction were apparent to all parties concerned. To read the lease today, so as to conclude that the defendants incurred none of these risks, while the plaintiff accepted the entire burden of loss, would be manifestly unconscionable.

There is another very important consideration. A revelant exception to the parol evidence rule was recently adopted in *Bullough vs. Sims,* 16 Ut. 2d 304, 400 P. 2d 20 (1965). This court therein restated the general proposition that parol evidence cannot alter or change the plain meaning of a document. However, in the language of the court, "there are exceptions; one of which is that when the parties place there own construction on it and so perform, the court may consider this as persuasive evidence of what their true intention was." In the *Bullough* case, the parties had entered into a written agreement settling the estate of their deceased father, and then for several years thereafter engaged in conduct which was contrary to the terms of the agreement. This court simply held that the conduct created an ambiguity regardless of the language of the document, and therefore ruled that evidence of the conduct was admissable for the

purpose of ascertaniing the intention of the parties to the original agreement. By way of analogy, in the present case, the conduct of the defendants has implied an ambiguity inasmuch as the defendants first suggested that paragraph 7 of the lease was not clear by filing a factual affidavit with their motion for summary judgment. The plaintiffs then filed counter-affidavits directed to the intention of the parties so far as paragraph 7 is concerned, and thereafter the defendants introduced into evidence at the hearing of their motion for summary judgment, a letter which they contended supported their position as to what paragraph 7 actually meant. By their conduct, the defendants have admitted that paragraph 7 of the lease is ambiguous and uncertain so far as they are concerned. If the defendants are right in this admission, then certainly parol evidence became material in order to ascertain the true intention of the parties to the lease, and the court erred in granting the defendants' motion for summary judgment.

A case very similar to the present controversy, and one which helpfully summarizes several applicable rules, was decided in California in 1952.In *Bartell vs. Associated Dental Supply Company,* 114 C.A. 2nd 750, 251 P. 2d 16 ,1952), the court had before it for consideration the following paragraph of a lease:

> From and after January 1, 1949, the lessee is granted the right to cancel this lease upon six months written notice or, at its option, shall become entitled to a reduction of rent to be agreed upon mutually between the parties hereto in the event that the business of lessee has declined to a degree that it would be impossible to pay the

> rent herein provided, due to any or all of the following causes or reasons, viz: Competition of the Federal, state or other governmental authorities in the field of dentistry by health insurance or any other media directly affecting the practice of dentistry or in the event of a material decline in general business conditions or a major national financial or business depression or recession.

Speaking of the above-quoted provisions of the lease, the court stated as follows:

> . . . Let us examine the clause in question. Possibly a cursory reading of it might support defendants' contention that because of the 'or' the lessee was given an absolute right to cancel while the right to reduce the rent was conditional. But a more thoughtful study of it, in view of the other provisions of the lease, particularly the provision for a five-year term [citing authorities] prevents one from determining 'to a certainty and with sureness' what is meant. On the very face of it, it does not appear reasonable that parties would contract that after January 1, 1949, (three years after the beginning of the lease) the lessee, with or without reason, could cancel, but his right to an undetermined reduction in rental should be conditional.
>
> The difference of the meanings sought to be given by the parties to the paragraph amounts, in effect, to the question of whether or not there should have been a comma between the words 'notice' and 'or.' That very fact shows the uncertainty of the paragraph provisions. A matter as important as a lease of business property at $650.00 per month should not be determined by a court from the writing alone as to whether a comma was intended or not. Such a determination could be only a guess. . . .

The same may be said of the case now before this court, for a lease of business property at $275.00 per month for a period of ten years for the purpose of operating a service station on said property, which lease was entered into by the parties knowing full well that a highway would be constructed in the area of the leased premises which could reasonably be expected to divert traffic away from the premises, is sufficiently important not to resort to a guess as to what the lease means.

What was said in the final paragraph of the *Bartell* opinion adequately states the contention of the plaintiff in this Point No. 2:

> In our case, the language of the lease is fairly susceptible of either of the constructions contended for and, hence, extrinsic evidence [may be] properly resorted to in order to determine the intention of the parties.

POINT NO. 3

THE COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

By its proposed amended complaint, the plaintiff alleged as Count I precisely the same allegations that were contained in plaintiff's original complaint, which complaint was dismissed with prejudice pursuant to the defendant's motion for summary judgment. By Count II of the proposed amended complaint, the plaintiff sought a total abatement of the monthly rental based upon an entirely different provision of paragraph 7 of

the lease than had been alleged in the original complaint and in Count I of the proposed amended complaint. The proposed amended complaint also contained Count III, which Count stated a cause of action for reformation.

Our Utah Rule of Civil Procedure 15 authorizes amended and supplemental pleadings as follows:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. (Emphasis added.)

Utah Rule of Civil Procedure 8(e) (2) provides as follows:

> A party may set fort two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency, and whether based on legal or on equit-

> able grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Also relevant to this inquiry is Utah Rule of Civil Procedure 18(a) which provides in pertinnent part as follows:

> (a) Joinder of Claims. The plaintiff in its complaint or in a reply setting forth a counter-claim and the defendant in an answer setting forth a counter-claim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. . . .

From the foregoing Utah Rules of Civil Procedure, it is apparent that the plaintiff's proposed amended complaint was not unacceptable because more than one claim or cause of action was stated, nor because alternative relief was prayed for, not because the claims may not have been entirely consistent.

More particularly, Rule 15 clearly indicates that permission to amend a pleading shall be liberally granted. As was stated by Justice Wade in *Ballard vs. Buist,* 8 Ut. 2d 308, 333 P. 2d 1071 (1959):

> It has always been the rule in this State to be liberal in the allowance of amendments to the end that there can be a complete adjudication of the controversy upon the merits and so that justice may be served.

In addition, although it was decided prior to the enactment of our present Rule 15, *Provo City vs. Claudin,* 91

Ut. 60, P. 2d 570 (1936) contains the following pertinent comment by Justice Wolfe:

> It must be noted that the court may, upon sustaining a demurer, refuse to permit an amendment to a pleading if it deems no amendment can be made which will circumvent the ruling. . . . In such case, the pleader is virtually out of court, it is as if the court had said, 'your pleading is not good in law and, under the facts as I apprehend they can be pleaded, you cannot state a good action or defense in law.' Naturally, it is not usually done on a first complaint or answer because the court cannot ordinarily know that other facts to make the pleading good cannot be pleaded. And a refusal to permit pleading over where it does not appear positive that no cause of action or defense can be pleaded may run easily into an abuse of discretion.

For those alternate reasons stated in POINTS 1 and 2, the plaintiff contends that Counts I and II of the proposed amended complaint state valid claims against the defendants, and the trial court was required either to grant the declaratory relief prayed for in both complaints or permit the amendment and receive competent evidence at trial as to what paragraph 7 means. Contrary to the factual situation in the *Claudin* case quoted above, in the present case the trial court was not left to speculate as to whether additional facts not alleged in the plaintiff's original complaint could be pleaded to state a good cause of action if an amended complaint were permitted. This is so for the reason that the plaintiff placed before the trial court its proposed amended complaint, and Counts II and III thereof state

additional, separate, alternate basis for relief not pleaded against the defendants in the original complaint.

In Count II of the proposed amendment the plaintiff prays for a total abatement for the rent based upon those provisions of paragraph 7 which read as follows:

> . . . [i]f for any reason, the possession or beneficial use of the premises is interfered with, the rent hereunder shall abate until the premises are fully restored to fitness for occupancy or such interference has ceased.

Like the language or paragraph 7 relied on in plaintiff's original complaint and in Count I of the proposed amendment, which plaintiff contends clearly entitles the plaintiff to the option to terminate the lease, it is submitted that the additional provisions of paragraph 7 as set forth immediately above are clear and unambiguous in providing the plaintiff with a total abatement of the rent under the circumstances pleaded in Count II. If this is not so, then again, at the very least, it must be said that the language is uncertain or ambiguous so as to make parol or other extraneous evidence not only admissible but desirable for the purpose of determining the meaning of the phrase. This is so for the reason that the provision obviously does not say "there shall be no abatement of rent in the event the new highway alters the flow of traffic away from the leased premises."

As to Count III of the proposed amendment, therein is alleged a valid cause of action for reformation of the lease. The critical point here, is that the parol evidence rule is not applicable to an action for reformation. (See

Sine vs. Harper, 118 Ut. 415, 222 P. 2d 571 (1950), and Degnan, *Parol Evidence — The Utah Version,* 5 Utah Law Review, 158, 175 (1956). We are, therefore, hard pressed to fathom any legitimate reason why the trial court refused to permit the plaintiff to file its proposed amended complaint so far as Count III is concerned. As was indicated earlier, if the trial court read the provisions of paragraph 7 of the lease contrary to the contentions of the plaintiff and also erroneously concluded that paragraph 7 was not uncertain or ambiguous so as to permit the admission of parol or other extraneous evidence to explain its meaning, then we can understand why summary judgment was granted and why the trial court would have been reluctant to permit an amended complaint setting forth the causes of action described in Counts I and II of the proposal. However, the same cannot be said for whatever reason the court might have had for prohibiting the pleading of Count III. The holding in *Lone Star Motor Imports, Inc. vs. Citroen Cars Corporation* (C.A. 5th, 1961) 288 F. 2d 69 is in point. It was there held that where no grounds whatsoever exist for denial of leave to amend, the test for abuse of discretion is satisfied and the trial court must be reversed upon appeal. It will not do now, to say that the trial court's refusal to grant the plaintiff permission to file its proposed amended complaint was harmless, inasmuch as under the familiar rule of res judicata the dismissal of the plaintiff's complaint pursuant to the motion for summary judgment would bar a subsequent prosecution of the claim for reformation, inasmuch as the claim for reformation arises out of precisely the same facts and circumstances as the claim described in the plaintiff's

original complaint. (See *Wheadon v. Pearson,* 14 U. 2d 45, 376 P. 2d 946 (1962).) Thus, the refusal to allow the plaintiff to file its proposed amended complaint is tantamount to a dismissal of the cause of action for reformation of the lease without any hearing whatsoever. Surely, such action on the part of the trial court was an abuse of discretion.

In the present case, the plaintiff's motion for leave to file the proposed amended complaint was made within ten days after the plaintiff received notice that the defendants' motion for summary judgment had been granted. In addition, no prejudice whatsoever would have resulted to the defendants had the plaintiff been allowed to amend its complaint, plaintiff's motion was the first occasion permission to amend had been sought, the motion was not an attempt to delay the proceedings, nor can it be said the motion was made in bad faith. On balance, it is submittetd that the letter as well as the sprit of the law applicable to this issue clearly favor allowing the plaintiff to file its proposed amended complaint. Under the circumstances of this case, the trial court's refusal to permit the proposed amendment, in the language of Justice Wolfe, ran "easily into an abuse of discretion."

POINT NO. 4

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR AN ORDER REQUIRING PLAINTIFF TO MAKE DEPOSITS OF THE MONTHLY RENTAL INTO COURT PENDENTE LITE.

Before the trial court, the plaintiff sought an order requiring it to withhold from the defendants the monthly rental payments provided for in the lease, and make deposits of same into court pending a termination of the action. After inception of the lease on June 1, 1961, the plaintiff undertook to operate a service station on the leased premises. Beginning in the spring of 1965, for those reasons alleged in plaintiff's original complaint, the plaintiff communicated to the defendants its desire to cancel the lease and be relieved from any further obligations thereunder. However, the defendants refused to allow cancellation and this action was subsequently commenced on July 1, 1965.

The plaintiff has not used the leased premises for the operation of a service station or for any other purpose since January 1, 1965, and since that date the premises have been vacant and have produced no income whatsoever to the plaintiff in spite of the plaintiff's efforts to sublet or otherwise economically use the property. Between January 1, 1965, and the time of plaintiff's motion for the requested order, the plaintiff paid to the defendants a total sum of $2,750.00, and between the time this action was started on July 1, 1965, and the time of plaintiff's motion the plaintiff paid to the defendants the sum of $1,100.00.

A.

Plaintiff is Entitled to Relief from Payment of Rent to the Defendants Pendente Lite.

The Utah Declaratory Judgment Act provides in pertinent part, as follows:

> 78-33-1. *Jurisdiction of District Courts-Form-Effect.* The district courts within their respective jurisdiction shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.
>
> * * *
>
> 78-33-12. *Chapter to be Liberally Construed.* This chapter is declared to be remedial; its purpose is to settle and to *afford relief from uncertainty and insecurity with respect to rights,* status and other legal relations; and is to be liberally construed and administered. (Emphasis added)

The plaintiff has already paid to the defendants $1,100 since the beginning of the present action on July 1, 1965. Assuming the relief sought by this appeal is granted in whole or in part, in order to afford the plaintiff complete relief from "uncertaintly and insecurity" with respect to its rights in and to the monthly rental installments, relief from the payment of said payments to the defendants pendente lite is essential. On the other hand, in order to fully protect the interests of the defendants in this regard a requirement that the plaintiff deposit said payments into court pursuant to Section 78-27-4, Utah Code Annotated (1953) would be proper.

Affording such relief to the plaintiff and securing such protection for the defendants would comply most completely with the legislative mandate of Section 78-33-12 wherein it is provided that the Utah Declaratory Judgment Act is to be liberally construed and administered. Pursuant to that Act, the pleadings before the court contain prayers for declaratory and equitable relief which relief will not be fully available to the plaintiff unless the court permits the plaintiff to withhold the monthly rental installments from the defendants pending the outcome of the present action. All parties to the Lease are engaged in a genuine dispute as to the meaning of the lease. Therefore, we can conceive of no good reason why the plaintiff should be singularly burdened with the loss, and risk of loss, pending a determination by the courts as to what the lease means.

The risk and potential loss incurred by the plaintiff upon withholding the monthly rental payments from the defendants, without court approval, are substantial since a breach of the lease by failure to pay the rent reserved could subject the plaintiff to an action for damages, forfeiture of the lease, and possibly treble damages as provided for in Section 78-36-10, Utah Code Annotated (1953). In the alternative, payment of the rent to the defendants followed by plaintiff's action to recover-back any portion of the rental payments paid to the defendants, in the event the plaintiff prevails in the present action, would be extremely tenuous in view of the rule stated in 32 Am. Jur., Landlord and Tenant, Section 472, as follows:

> It is the general rule that payments voluntarily made, although not owing,

> are not recoverable back, and if the payment or rent demanded of a tenant is deemed voluntary in law, the tenant cannot recover such payment even though the amount demanded and paid was not owing.

It is submitted that allowing the plaintiff to withhold the monthly rental payments from the defendants upon condition that said payments be deposited with the court fully comports with the spirit and letter of the controlling legislation. Equitably, the plaintiff is entitled to such conditional relief.

B.

The Order Sought by Plaintiff is procedurally proper.

Section 78-7-24, Utah Code Annotated (1953) provides as follows:

> *Process and Procedure when Statutory Provision Insufficient.* When jurisdiction is, by statute, conferred on a court or judicial officer, all means necessary to carry it into effect are also given, and in the exercise of jurisdiction. If the course of proceeding is not specifically pointed out, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the rules of procedure.

As originally enacted in Utah, Section 78-7-24 reads as follows:

> When jurisdiction is, by statute, conferred on a court or judicial officer, all means necessary

> to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the codes of procedure.

(It should be noted that the punctuation in the original version of the section is different than it appears in the 1953 Code. A careful reading of the two versions clearly indicates that the most recent version is in error and that the section should be read, punctuated as it was enacted originally.)

It cannot be questioned that Section 78-7-24 is applicable to the present action since the jurisdiction to render declaratory judgments has been expressly conferred upon the Utah district courts by Section 78-33-1, set forth above. Nor can it be questioned that inherent within the power to render a declaratory judgment is a court's power to protect the rights of the respective parties to the prseent action. As was discussed in Point 4-A above, according to Section 78-33-12 a district court has the power to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Therefore, Section 78-7-24 is merely a legislative mandate to the courts to adopt whatever procedure may be necessary to implement their power.

In sum and substance, Section 78-7-24 is the statutory authority for creating whatever remedy or mode of procedure is proper, just, and equitable under the particular circumstances of a given case. Said section

is a codification of the ancient maxim, *ubi jus, ibi remedium,* which maxim means where there is a right, there is a remedy, and which maxim was quoted with approval by the Utah Supreme Court in *State v. Morgan,* 23 Utah 212, 228, 64 Pac. 356, 361 (1901). Although there is no Utah legislation expressly describing the order requested by the plaintiff, the *Morgan* case confirms a court's right to devise new remedies, where neither the common law nor statute provide the necessary remedies. The *Morgan* case holds that the right to devise new remedies was long ago recognized as part of every court's inherent power.

A situation similar in many respects to the facts and circumstances of the present action was the subject of *Watts v. Greenwood,* 49 Utah 118, 162 Pac. 72 (1916). In that case the plaintiff-mortgagor sought a writ of mandamus from the Supreme Court to the District Court of Millard County compelling the District Court to comply with the Utah statute which provides that when a mortgagee has commenced a chattel-mortgage foreclosure by advertisement, and it is made to appear by the affidavit of the mortgagor that the mortgagor has a legal counterclaim or other valid defense against the collection of the whole or any part of the amount due and secured by the mortgage, the court may, by an appropriate order, enjoin the mortgagee from foreclosing the mortgage by advertisement, and direct that all further proceedings for the foreclosure be had in the District Court. In the *Watts* case the mortgagor had filed the necessary affidavit and originally the court had entered the order requiring all further proceedings for

the foreclosure to be had in the District Court. Thereafter, however, upon motion by the mortgagee the court required the mortgagor to execute an indemnity bond to hold the mortgagee harmless from loss for the reason that the mortgaged property consisted of livestock which would depreciate in value unless properly fed and cared for, and for the further reason that the expenses of feeding and keeping the livestock would greatly depreciate the mortgagee's security. The mortgagor delivered the bond as requested. Thereafter, the mortgagee requested an additional bond which the mortgagor refused to provide. Thereupon, the court withdrew its original order directing that the proceedings for foreclosure be had in the district court, and then allowed the mortgagee to foreclose by advertisement and sell the livestock.

In discussing the various alternatives available to the District Court under the circumstances, the Supreme Court relied upon Comp. Laws 1907, Section 720 (now Section 78-7-24) and wrote as follows:

> As already pointed out, the [statutory provisions] are purely remedial as well as highly equitable, and, *although it may not be expressed in the section,* yet the district judge or the district court has full power to enforce the spirit as well as the letter of that section, and to that end may invoke any suitable remedy that may be just and equitable. . . .
>
> . . . *Indeed, it would seem to require no great ingenuity to hold matters in status quo and so conduct the proceedings* [*under the applicable statutory provisions*], *that no injustice will result to either party.* (Emphasis added.)

The *Watts* case contains excellent examples of the inherent flexibility available to a district court, and the equitable considerations are very similar to those involved in the present action. For in the case at bar as in the *Watts* case, it may be said: "Indeed, it would seem to require no great ingenuity to . . . so conduct the proceedings . . . that no injustice will result to either party."

Given the general principles discussed above, granting of the order sought by plaintiff would be proper. However, more specifically, our research has disclosed one case where relief similar to that sought by the plaintiff has been considered. In *Fouch v. Rollins,* 146 F. Supp. 87 (Alaska, 1956), the plaintiff and defendants had entered into a real estate conrtact under the terms of which the plaintiff was to purchase from the defendants certain real property. The contract called for the purchase price to be paid in installments, all of which accrued installments had been paid by the plaintiff on schedule. The plaintiff filed an action against the defendants wherein he contended that after the execution of the contract he discovered that a substantial portion of the house erected upon the subject real property was encroaching upon a public street. He further contended that upon discovery of this encroachment he demanded that the defendants take necessary steps to remove the encumbrance by moving the house within the borders of the real property purchased. He then alleged the failure of the defendants to comply with his demands, and damages.

Pursuant to Rule 67, Federal Rules of Civil Procedure, the plaintiff sought the order of the court re-

quiring the plaintiff, during the pendency of the action, to pay all further purchase installments under the real estate contract into the registry of the court. Rule 67 of the Federal Rules of Civil Procedure, which deals with deposits in court, does not expressly authorize the relief sought by the plaintiff in the *Fouch* case, and as a matter of fact, the court commented "diligent inquiry fails to reveal cases decided on this facet of the rule." The court therefore went on to state, "I am disposed to determine this motion on the basis of the existing equities," and then granted the plaintiff's motion, permitting the plaintiff to pay all amounts due and becoming due under the real estate contract into the registry of the court pendente lite.

Given the equitable considerations arising out of the facts and circumstances of this case and the broad and liberal interpretation to be accorded the Utah Declaratory Judgment Act and Section 78-7-24, Utah Code Annotated (1953), it is submitted that it was error for the trial court to deny the plaintiff's motion for an order requiring plaintiff to make deposits in court pendente lite.

CONCLUSION

As shown by this brief, the language of paragraph 7 of the lease between the parties either entitles the plaintiff to the declaratory judgment prayed for in its original complaint and proposed amended complaint, or the provisions of paragraph 7 are so uncertain and ambiguous as to admit of parol or other extraneous evidence for the purpose of ascertaining the

meaning of the lease, all of which make the trial court's summary judgment erroneous as a matter of law. It is also submitted that the trial court abused its discretion in refusing to permit the plaintiff to file its proposed amended complaint, and that the trial court erred as a matter of law in denying plaintiff's motion for an order declaring the plaintiff to make deposits of the monthly rental in court pendente lite. Therefore, the summary judgment should be vacated and set aside and the trial court should be ordered to grant plaintiff permission to file its proposed amended complaint, and issue an order requiring the plaintiff to make deposits of the monthly rental in court pendente lite.

Respectfully submitted,

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